

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

M. A. GEDNEY COMPANY¹

Employer

and

ALFRED DeWITT

Petitioner

and

BAKERY, LAUNDRY, ALLIED SALES DRIVERS
AND WAREHOUSEMEN, LOCAL UNION NO. 289,
affiliated with the INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA²

Union

Case 18-RD-2517

DECISION AND ORDER

Petitioner seeks an election to determine whether certain employees of the Employer wish to continue to be represented by the Union. Petitioner, Employer and Union agree on the unit description. However, the Union contends that this petition should be dismissed because Petitioner is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act. In addition, contrary to the Employer and Petitioner, the Union refused to stipulate that there is no contract barring further processing of this petition. While I conclude that no contract exists barring processing of this petition, I also conclude that Petitioner is a supervisor within the

¹ The Employer's name appears as amended at the hearing.

² The Union's name appears as amended at the hearing.

meaning of Section 2(11) of the Act. Therefore, the petition is dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. In the first section of this decision I will review the Employer's operation and the history of collective bargaining between the Employer and Union. Second, I will review the evidence regarding the existence of a contract and explain my conclusion that no contract exists that bars further processing of this petition. Finally, I will summarize the record with regard to Petitioner's job and duties, and explain my conclusion that Petitioner is a supervisor as defined in the Act.

³ The Employer, M. A. Gedney Company, is a Minnesota corporation with a facility in Chaska, Minnesota, where it is engaged in the manufacture of pickles and related products for retail sale. During the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000 and, during that same time period, the Employer sold and shipped goods and materials valued in excess of \$50,000 from its Chaska, Minnesota facility directly to points located outside the State of Minnesota.

THE EMPLOYER'S OPERATION AND THE COLLECTIVE-BARGAINING RELATIONSHIP BETWEEN THE EMPLOYER AND UNION

The Employer has only one plant, a 150,000 square foot facility, located in Chaska, Minnesota. The Employer has been in existence since 1880. It produces pickles, sauerkraut, sauces, vinegars and preserves. The Chaska plant operates one shift. The total Employer complement is about 90 employees and, of those, 65 are in the unit currently represented by the Union.

Chief executive officer and president of the Employer is Chuck Weil. Reporting directly to Weil is the vice president of operations, Kevin Talbot. Reporting to Talbot is Production Manager Brian Borchardt. No party contends that Borchardt is in the unit. Reporting to Borchardt are various leads. The leads, their areas, and the numbers of employees in their areas are as follows: Herman Salinas, production, 30 employees; Felipe Aguirre, sanitation, five employees; John Melchert, warehouse, three employees; tank farm, Martin Melchert, 2-3 employees; and Alfred DeWitt, mechanics, 11 employees. One of the employees in the same department as DeWitt is Kenneth Kruzel, who, according to DeWitt, is his assistant. By the close of the hearing the Union also contended that Kruzel is a supervisor within the meaning of Section 2(11) of the Act.

With the exception of DeWitt, there is little record evidence regarding the duties and responsibilities of the leads.

The Employer and Union have had a collective-bargaining relationship since about 1962. According to the Employer, the last signed contract between the Employer and Union expired in 2002. Historically and continuing up to the time of the hearing, included in the unit represented by the Union have been the various leads, including DeWitt.

THE CONTRACT BAR ISSUE

The Employer contends, and there is no evidence to the contrary, that the last signed contract between the Employer and Union expired in 2002. In September 2002, the parties agreed to extend the contract for one year, although this agreement to extend the contract was not signed by the parties and is not in the record. The Union and Employer negotiated anew for a contract in October 2003, and in fact a contract was reached. In February 2004, employees ratified a contract that was set to expire on December 31, 2004. While this contract was ratified, it was never signed by the parties. There is no explanation as to why it was not signed, but it appears that the Employer honored the terms of the agreement.

On January 4, 2005, Employer President and CEO Weil issued a memorandum to “M. A. Gedney Union Employees.” In it he announced that because Union officials failed to timely file a notice of intent to negotiate, the Employer opted to enforce Article 23 of the unsigned contract, which states that, without 60 days’ notice, the current contract remains in effect for an additional year. The memo states, “The current contract expired on December 31, 2004, but will now expire on December 31, 2005.” The memorandum goes on to state that the Employer will continue to honor the terms of the contract, even though it was never signed by Union officials, but that the Employer has opted to grant wage increases of 2.5 percent to Union employees.

In order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements, which have been well established by Board case law. In *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), the seminal case setting forth these requirements, the Board held that to constitute a bar to an election, an agreement containing substantial terms and conditions of employment sufficient to stabilize the parties’ relationship must be signed by the parties prior to the filing of the petition. Here, there is a document

containing substantial terms and conditions of employment to stabilize the parties' relationship. However, this document is in the form of a memorandum from the Employer unilaterally extending the prior unsigned contract for one year. This document has never been signed by the parties. For that matter, there is no evidence that the Union has ever agreed to the contents of the Employer's memorandum. Thus, there is no contract to bar processing the petition in this case, which was filed on January 10, 2005.

PETITIONER'S STATUS

Petitioner Alfred DeWitt has been employed by the Employer for 22 years, nearly all of it as the maintenance lead. He has also been referred to as the maintenance manager and maintenance supervisor, and in fact when signing the instant petition he wrote that his title is "Maintenance Mgr." Throughout his employment with the Employer, all parties have considered DeWitt part of the unit.

During his testimony, DeWitt made clear that his duties and responsibilities have not changed during the many years he has been maintenance lead. Thus, I conclude that DeWitt's duties and responsibilities as set forth in the record are long-standing and are performed regularly. During much of his testimony, DeWitt also emphasized that whatever duties he had, his assistant, Kenneth Kruzel, also had. It is this testimony that led the Union to contend at the end of the hearing that Kruzel is also a 2(11) supervisor. Thus, as I describe DeWitt's duties and responsibilities, I will also explain how Kruzel's duties are similar, if the record suggests that they are.

There is no record evidence suggesting that DeWitt fires employees on his own. There is also no evidence that he lays off, recalls, transfers, promotes or rewards employees, or that he effectively recommends any of these actions. Finally, the record does not suggest that DeWitt

adjusts employee grievances, or effectively recommends the adjustment of employee grievances. Rather, there are three indicia of supervisory status that require analysis in this case. They are whether DeWitt effectively recommends the hiring of employees, whether DeWitt assigns or directs employees' work using independent judgment, and whether DeWitt disciplines employees. The record evidence with regard to each of these indicia will be considered seriatim, after I provide an overview of DeWitt's job. The final section of this part of the decision will explain my conclusion that DeWitt meets the definition of "supervisor" under the Act.

Overview of DeWitt's Job

As far as DeWitt knows, he has no written job description. If one exists, it has never been provided to him. DeWitt punches the same time clock as the production employees and is, therefore, hourly paid. DeWitt is paid \$3.81 more an hour than the highest paid employee in his department (excluding Kruzel), and is paid \$2.67 more an hour than Kruzel. However, all leads are paid between \$2 and \$5 more than the employees in their departments. DeWitt works from 7:00 a.m. to 3:30 p.m., Monday through Friday. He has an office, which is next to the production area. The record is clear that DeWitt is not regularly assigned to perform maintenance work. Rather, his performance of maintenance work is limited to assisting another maintenance mechanic who either needs another pair of hands and cannot find someone else, or to "troubleshooting" (helping another maintenance person come up with a solution to a problem). It appears that Kruzel is also not regularly assigned maintenance work and that any work he does perform is in the same circumstances as DeWitt.

DeWitt is responsible for the operation of the maintenance department. Maintenance employees repair production equipment and perform preventive maintenance work. Except for the maintenance electrician and the two boilermen, who have specialized skills, all maintenance

employees have the skills to perform most of the work required, with the caveat that more senior employees are more skilled based on experience. On a day-to-day basis the maintenance employees know what jobs need to be performed by reviewing the production schedule. The production schedule describes what product will be run, and based on the schedule, the maintenance employees know what equipment to set up. Setting up equipment, or changing it over for a different product, requires 15 minutes to one hour, depending on the piece of equipment. Vice President of Operations Talbot, but more often Production Manager Brian Borchardt or DeWitt, can verbally alter the production schedule based on changing needs or because of problems in the production process.

Next to DeWitt's office is an office for the parts clerk, who is Rich LaFountain. LaFountain orders parts for equipment, assists employees in finding parts or manuals, troubleshoots on the line, and assists DeWitt. Both LaFountain and DeWitt sign purchase orders. However, the vice president of operations reviews all orders involving \$10,000 or more. With regard to work performed by outside contractors, Kruzel and DeWitt obtain bids for large projects, while LaFountain can call outside contractors for smaller projects. DeWitt's other responsibilities are to recommend to Talbot how to handle maintenance issues, to call outside contractors to come in on an emergency basis, to deal with vendors, and to make sure equipment is running properly in the production area and that maintenance work is being properly performed.

DeWitt and all other leads attend meetings held by Vice President of Operations Talbot, where Talbot advises the leads and other managers of policies of the Employer. The last meeting held by Talbot was about six months prior to the hearing. DeWitt or Kruzel and all other leads also attend a meeting held every day at 10:00 a.m. to discuss problems of the day, to go over the

production schedule, and to review any problems with equipment. Sometimes a production employee might attend these meetings.

DeWitt's Role in Hiring Employees

The Employer's human resources department screens applicants for employment in the maintenance department and generates a list of candidates. Then the human resources employee contacts DeWitt for scheduling interviews. Only the human resources employee and DeWitt participate in the interviews, although Kruzel might sit in—especially if the Employer needs a boilerman, as that is not DeWitt's area of expertise. DeWitt actively participates in the interview by asking candidates about their past experience and qualifications. DeWitt then recommends which candidate should be hired and at what pay level (Maintenance I, II or III) based on whether he believes they are qualified to perform the job. It appears that part of the role of the human resources employee is to check with past employers of the candidates, although the record is unclear whether this check occurs before or after the interviews. According to DeWitt, “the three of us (if Kruzel is present) usually decide if they are a likely candidate.” DeWitt testified that he participated in the interviews of the last three maintenance employees hired by the Employer.

DeWitt's Role in Assigning and Directing Work

DeWitt does not create the production schedule that is used by maintenance employees to determine their day-to-day tasks. However, DeWitt does prepare preventive maintenance schedules, with the assistance of Kruzel. There are two types of preventive maintenance schedules. One is a schedule that lists equipment that needs greasing or lubricating. The other lists repairs or service that is needed. The purpose of the preventive maintenance schedules is to

make it easier for maintenance employees to perform work on equipment when the equipment is scheduled to not be in use. Preventive maintenance work could be scheduled during the eight-hour workday, or possibly the weekend. DeWitt and Kruzel determine priorities—that is, what piece of equipment needs attention first. According to DeWitt, the preventive maintenance schedule sometimes lists the equipment requiring service and the name of the employee who is to perform the service. Whether the person is listed on the schedule or not, it is the job of DeWitt and/or Kruzel to assign the maintenance employee who is to work on the equipment requiring service or repair. To quote DeWitt, “We will pick who we think can do the job best.” Then either Kruzel or DeWitt follows up to make sure the work has been done correctly. If it has not been, they will require the employee to redo the work, or assign someone who knows how to do the job to work with the employee who did not perform the repair correctly the first time.

With regard to the scheduling of hours, it appears that maintenance employees work either from 7:00 a.m. to 3:30 p.m. or 8:00 a.m. to 4:30 p.m. The latter hours are considered less desirable by maintenance employees, and therefore once they are trained, the less senior employees are assigned the hours of 8:00 a.m. to 4:30 p.m. (except for one employee noted below). If overtime work is needed, and it is not mandatory for all employees to show up, the overtime is assigned by seniority. The maintenance employee with greatest seniority is given the option of working, and, of course, the least senior employees work any overtime not desired by more senior employees. With regard to vacations, they too are scheduled by seniority. However, while not further explained on the record, DeWitt indicated that he can deny vacation requests not only because more than two employees are scheduled to take vacations, but also based on skill levels. While not clear, this denial based on skill level may be limited to not wanting the two boilermen both gone on vacation at the same time. DeWitt, Kruzel and even

LaFountain (in the absence of DeWitt and Kruzel) can change the hours of work of remaining employees to cover for vacationing employees.

DeWitt's Role in Disciplining and Recommending Discharge of Employees

One of DeWitt's responsibilities immediately upon arriving at work every morning is to review messages left on his voicemail. Among the messages that might be left are those from maintenance employees who are calling in that they will be absent or late. The Employer assesses employees a certain number of points for any unexcused absences and tardies, and when the points add up to certain numbers, employees are issued verbal reminders, written and final written warnings, suspension and termination notices. However, there is no evidence that DeWitt has a role in determining whether disciplines will issue, or that DeWitt is signing those disciplines, where the issue is attendance or tardiness. Rather, the Employer's human resources employees assess the points, keep track of the number of points, and generate the appropriate disciplinary notices to employees. The only role DeWitt has in this process is taking the call notifying the Employer of absence or tardiness and notifying human resources of the call.

With regard to discipline not related to tardiness or absenteeism, DeWitt stated at the hearing that he does not discipline employees. However, the record is clear that he had some role with regard to performance issues related to two maintenance employees.

The first performance issue involved a maintenance employee in 1997. The employee in question called in absent, but assured the person he talked to that he would call DeWitt later to explain his absence. The employee did not call DeWitt as promised, and DeWitt had to call the employee because DeWitt wanted to know how long he had to cover for the employee.

Apparently DeWitt reached the employee, who, for the first time, claimed to have a work related injury and told DeWitt that he was going to the doctor and would keep DeWitt informed.

DeWitt responded that when the employee was able to return to work, his new hours would be from 8:00 a.m. to 4:30 p.m. (hence, he would no longer work 7:00 a.m. to 3:30 p.m.). When the employee asked why the change, DeWitt responded that he needed someone dependable in the mornings. The employee then failed to report to work. According to a grievance filed by the employee (a copy of the grievance is in the record), he then received a letter from the Employer stating that he had voluntarily quit. According to DeWitt's testimony on the record, DeWitt in fact recommended to the Employer's human resources department that the employee be terminated because he was always late (this was before the Employer implemented its no fault point system), and human resources agreed with him after conducting a review of the employee's records⁴.

The second performance issue involved a maintenance employee in 2004. According to DeWitt, he heard from other employees that one maintenance employee was sleeping on the job. DeWitt and Kruzel confronted the employee and told the employee that sleeping on the job was unacceptable. The employee denied sleeping on the job. Employees observed this employee sleeping on the job several times after this, and, according to DeWitt, he even had a picture of the employee sleeping. Thus, DeWitt and Kruzel warned the employee again. The record does not reflect that either of these warnings was written. However, at some later time, presumably in response to more sleeping on the job, the employee was issued a written warning dated May 6, 2004. It is signed by DeWitt, the employee, and the Union steward. It is not signed by anyone from the human resources department, although DeWitt testified that the idea for the document

⁴ There is some dispute between the Union and Employer regarding whether the exhibits in the record related to this incident are complete. Whether or not there are documents missing from the record, this summary of the events of 1997 is based on memoranda written by DeWitt or his testimony (with the exception of what is contained in the grievance filed by the employee).

and the wording of the document were from an employee in human resources. The document states in part, “You have been warned about sleeping while on duty previously by Bud (DeWitt’s nickname) in August of 2003. Because of the responsibilities for safe operation of our boiler, this will be your final warning regarding sleeping on the job. The next incident will lead to termination of employment.” The employee in question remains in the Employer’s employ.

DeWitt Is a Supervisor Within the Meaning of Section 2(11) of the Act

I conclude that DeWitt is a supervisor within the meaning of the Act.

First, DeWitt effectively hires or recommends the hiring of employees. The record is clear that only DeWitt and an employee from human resources (and sometimes Kruzel) participate in interviewing and hiring employees for the maintenance department. DeWitt is the person who, on behalf of the Employer, questions applicants on their experience and skills. DeWitt was clear in his testimony that he and the human resources employee (and sometimes Kruzel) decide on who should be hired. Thus, DeWitt either effectively recommends the hiring of employees or actually hires employees. *Wake Electric Membership Corp.*, 338 NLRB 298 (2002) (human resources manager not a supervisor where role was to screen applicants and make sure there was a pool of applicants available for interview, where department heads then interviewed those applicants who survived the screening process); *The Lawson Milk Company*, 143 NLRB 916, 919-920 (1963) (personnel manager is a supervisor where he is one of two people who participate in hiring and the two persons together approved employment). Important to my conclusion that DeWitt either recommends the hiring or actually hires maintenance employees is the undisputed fact that no other manager participates in the interview process.

Second, DeWitt disciplines employees. While the Union and Employer disagree on the particulars of some documents in evidence in connection with DeWitt’s disciplinary authority,

there is no question that DeWitt, without approval from higher management, has disciplined employees. For example, in 1997, whether or not DeWitt effectively recommended the discharge of the employee, the fact is clear that in talking to the employee he made clear to the employee that he was giving the employee less desirable hours of work because the employee was undependable. More recently, in 2004, whether or not DeWitt drafted, or initiated the idea of drafting, the final warning contained in the record, the final warning itself makes clear that part of the reason the employee was being given a final warning was that DeWitt had already warned the employee in the past. Thus, the Employer used DeWitt's earlier warning to justify issuance of a "last chance" warning. Both of these instances support a conclusion that DeWitt disciplines employees. *Venture Industries*, 327 NLRB 918, 919 (1999) (department and line supervisors possess authority to discipline employees where they issue oral or written reprimands, and have authority to recommend suspensions); *CTI Alaska, Inc.*, 326 NLRB 1121 (1998) (assistant field supervisor clearly recommends discipline).

Finally, the record is clear that DeWitt regularly assigns preventive maintenance work to individual employees. While less clear, it appears that he assigns this work based on his assessment of employees' skills and abilities.

Because of my conclusion that DeWitt is a supervisor, and because he filed the petition herein, the petition must be dismissed. *Rose Metal Products*, 289 NLRB 1153 (1988); *Doak Aircraft Co.*, 107 NLRB 924 (1954).

While I conclude that DeWitt is a supervisor, I decline to find, based on this record, that Kenneth Kruzel is a 2(11) supervisor. First, I note that the burden of proof is on the party claiming supervisory status. *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003). In this case there is no evidence that Kruzel has ever hired or recommended the hire, or disciplined or

recommended the discipline, of an employee outside of the presence of DeWitt. Rather, Kruzel appears to sometimes (but not always) be present when DeWitt performs supervisory functions. I recognize that DeWitt testified that he or Kruzel assign preventive maintenance work, and that the record suggests that they do so based on assessments of employees' skills and abilities, but the record is not clear enough on this point. Moreover, the record does not establish when or how frequently Kruzel assigns preventive maintenance work on his own, without consulting with DeWitt.

Finally, my conclusion that DeWitt is a supervisor does not mean or suggest that all of the Employer's leads are supervisors. As I stated above, there is no record evidence concerning the jobs of leads other than DeWitt.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it is, dismissed.⁵

Signed at Minneapolis, Minnesota, this 3rd day of February 2005.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
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National Labor Relations Board
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⁵ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street N.W., Washington, DC 20570. This request must be received by the Board in Washington by **February 17, 2005.**